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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioner*

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA, *Respondents*

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL.

MEMORANDUM OF UNITED STEELWORKERS OF AMERICA IN OPPOSITION TO REQUEST BY UNITED STATES OF AMERICA, ET AL., IN NO. 78-436, FOR SUMMARY REMAND

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The United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser") and the United States (together with the Equal Employment Opportunity Commission) have each separately petitioned the Court for a writ of certiorari to review the judgment of the Fifth Circuit in this case. The United States in its petition, however, asks that this Court summarily vacate the judgment below

and remand the case "for reconsideration and supplementation of the record . . . ."[1]

In our petition we showed the importance of the issue decided by the court below and the urgency of this Court resolving that issue now. That issue, as phrased by the question presented in our petition, is:

> Does the prohibition against "discrimination" contained in Title VII of the Civil Rights Act of 1964 preclude an employer and union from voluntarily agreeing in collective bargaining to adopt an affirmative action program reserving 50% of the openings in a newly-created in-plant craft training program for black bidders, where there has been no prior discrimination against blacks at that plant but the progam is intended to alleviate one pervasive consequence of historic societal discrimination against blacks: the virtual absence of blacks from craft jobs.

The Government asks this Court to leave that issue unresolved; rather, the Government wishes to secure a remand in the hope that this case can be transformed into one raising different issues *not* presented on the existing record in this case: (1) Whether "Title VII [of the Civil Rights Act of 1964] permits affirmative remedial action by an employer and a union who have a reasonable factual basis for concluding that a plaintiff could establish a *prima facie* case of employment discrimination with respect to the plant and jobs in question," U.S. Pet. at 11; and/or (2) whether an "affirmative action program" can be upheld under Title VII where an "'administrative body charged with the responsibility made determinations of past discrimination by the [industry] affected and fashioned [a remedy] deemed appropriate to rectify discrimination.'" *Id.* at 19. The Government acknowledges that neither of these issues is presented on the record in this case, but speculates that

[1] Petition of the United States and EEOC (hereinafter "U.S. Pet.") at 20.

evidence might exist which could be used to recast the case in terms of one or both of these issues. Accordingly, the Government requests a remand to "supplement the record" with new evidence.

We show herein, first, that there is nothing inaccurate, misleading, or incomplete about the present record, on which both courts below proceeded; to the contrary, the existing record accurately and fully reflects the state of facts at the time Kaiser and USWA adopted their affirmative action program, and it reflects as well that the parties adopted that program for reasons other than those which the Government proffers to justify the program.

We then turn to a demonstration that the issues the Government speculates the case might present following remand are different from, but not as the Government contends narrower than, the issue actually raised by the case, and indeed, that the Government's hoped-for issues could be resolved in its favor only by surmounting legal difficulties which are not present in the case as it now stands.

Finally, we establish that it is the issue decided by the courts below and raised by our petition, and not the issues proposed by the Government, that will determine the legality of affirmative action programs which USWA has negotiated throughout the steel, aluminum, and can industries.

I.

A. The evidence in this case is that the affirmative action plan struck down by the courts below was not the product of a determination by Kaiser or USWA that a plaintiff might be able to prove a *prima facie* case of discrimination in hiring for craft jobs at the Gramercy plant. Nor was it a response to a finding by any government agency that such discrimination had occurred—there was no such finding, and the documents lodged by the Government with its petition do not indicate otherwise.

In fact, as the record shows, the quota program for filling craft apprenticeship vacancies at the Gramercy plant was established as part of a nationwide agreement between Kaiser and USWA covering 15 Kaiser plants throughout the United States. Kaiser and USWA entered into that program without making a plant-by-plant assessment of whether a plaintiff might be able to prove a *prima facie* case of discrimination against blacks in entry into craft jobs, and without such an assessment at the Gramercy plant in particular. USWA has entered into similar agreements with each of the other companies in the aluminum industry, with each of the companies in the can industry, with each of the companies in the steel industry (approximately 250 basic steel plants are covered by such agreements),[2] and with numerous other companies in a variety of other industries. In no industry were such agreements predicated upon an attempt by the parties to assess on a plant-by-plant basis the prognosis for suits claiming discrimination against blacks in entry into craft jobs; nor were they predicated upon findings by a government agency that discrimination had occurred at the covered plants.

Moreover, the affirmative action program USWA has negotiated in all of these instances, as exemplified by the program at issue here, is not tailored to benefit those who might have been victims of any discrimination that might have occurred in access to craft jobs at the covered plants. At the Gramercy plant, for example, craftsmen historically were hired "off the street,"[3] for neither blacks nor whites employed in production jobs at the plant were qualified to fill craft jobs. Yet the preferences established by the affirmative action program extend not to blacks who might have been in the craft hiring pool—and thus who might have been victims of discrimination in craft hiring at Kaiser had such discrimination occurred—but only to blacks already

[2] See USWA Pet. at 5 and n. 5.

[3] See USWA Pet. at 4 and n. 3.

employed at the plant in production jobs who lacked the qualifications to have secured craft jobs prior to the institution of the training program.

The affirmative action program USWA negotiated with Kaiser, and with large segments of American industry as described above, was not designed to remedy discrimination that might, or might not, have occurred at the plants where the program was put into effect. Rather, the program was designed to address a phenomenon which troubled the union throughout its jurisdiction: the virtually complete absence of blacks in craft jobs in industrial plants—an absence which contrasts, in many plants, with the presence of large numbers of blacks in production jobs. The reason for that phenomenon may well differ from plant to plant. The explanation for it at the Gramercy plant, as found by both courts below, is undoubtedly common: the pool of qualified craftsmen in the job market from which the plant could draw was almost exclusively white.

B. The Government suggests in its petition that a purpose of a remand would be to "permit one of the parties or an intervenor to seek to prove prior discrimination against blacks at the Gramercy plant." U.S. Pet. at 19.[4] Both courts below found that Kaiser had not discriminated against blacks in filling craft jobs at the Gramercy plant, and those findings were based on a full record which contains *inter alia:* the numbers of black and white craftsmen; the procedures the company used for filling craft vacancies; and the characteristics of the available pool from which craftsmen at the Gramercy plant were hired.

The Government makes no proffer as to ways in which

[4] That suggestion appears at odds with the statement earlier in the Government's petition that "it is unduly restrictive to permit the employer and union to adopt an affirmative remedy only if they can establish in court that the employer has been guilty of discrimination." U.S. Pet. at 11.

the record in this case is inadequate, or as to any specific evidence of discrimination which might be introduced, except to speculate that perhaps the same kinds of hiring criteria found to be suspect by the court in *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978) —an opinion involving another Kaiser plant, which expressly recognized that the circumstances at that plant were different from those at the plant involved in *this* case, *id.* at 1390-91, n. 35—could be shown to have been used at the Gramercy plant. Even that speculation is disingenuous. As the record shows, the craft positions at the Gramercy plant required journeyman craft skills; without a training program, the craftsmen hired off the street had to possess those skills; and, in the hiring area of the Gramercy plant, blacks constituted approximately one or two per cent of the pool of qualified journeyman craftsmen. Thus, the obstacle to blacks receiving crafts jobs prior to the institution of the present program was not some arbitrary general intelligence or high school education requirement imposed by Kaiser, as was found to be the case in *Parson*, but the inability of blacks to achieve journeyman skills due to societal discrimination. The only way *that* obstacle could have been removed by Kaiser was to establish, as the plan struck down by the court below does, a training program which teaches those skills over a two or three year period. That program, as the record shows, costs between $15,000 and $20,000 per year per trainee.

These facts were all before the courts below, which found not only that Kaiser had not discriminated against blacks in filling craft vacancies but that over the years Kaiser had made special efforts to attract black craftsmen to the Gramercy plant.[5]

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[5] As we noted in our petition, at 3-4, n. 2, USWA argued below that the record facts permitted a finding that Kaiser had discriminated, but the courts below rejected that claim.

II.

The Government's petition asserts that the remand it seeks "could significantly narrow the question presented in this case." U.S. Pet. at 20. As we showed in Part I, there is no evidence absent from this record which could transform the question presented. But even if such evidence could be found, it would not be accurate to say that the issue would be "narrowed." For what the Government hopes to create by a remand is not a lesser included issue encompassed in the question now presented, but an entirely different issue. The question now presented is whether private parties may *voluntarily* establish programs such as that here. If the Government could reconstruct the case on remand, the issue would become whether Title VII empowers or permits the Government to *impose* such programs upon private parties. Both of the theories the Government wishes to recast this case to present are bottomed on the following premise: the Government has the power to require private parties who have discriminated in the past to employ a quota as a "remedy," even though that quota advantages blacks, solely because of their race, who are not themselves the victims of the discrimination the quota is meant to "remedy."

The Government's first theory proceeds from that premise in the following way: courts may upon finding discrimination in violation of Title VII order quota "remedies"; Title VII favors voluntary compliance; therefore, private parties ought to be able to avoid litigation by voluntarily putting into place the kinds of remedies courts would order —in those instances where the private parties can establish that there was some predicate for a court to act.[6]

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[6] Thus, the Government argues:

"... Faced with possible violations of Title VII, Kaiser could have refused to take corrective action and instead have allocated its resources to defend itself in litigation. Had Kaiser

The Government's second theory builds upon that premise more directly: the Office of Federal Contract Compliance ("OFCC") has the power to require an employer that contracts with the Government to adopt a quota program, and such power does not conflict with Title VII.

Resolution of the issue whether the Government may impose quota remedies upon nonconsenting private parties requires resolution of knotty questions not implicated by the issue which is properly here. The Government's assumption, for example, that once a court in a Title VII case finds discrimination of some sort, it may then award a remedy directed not at making-whole a victim of that discrimination but instead at providing a benefit to a non-victim—because that non-victim is the same race as the actual victim—is by no means obviously correct. What Title VII forbids is discrimination "against any individual." 42 U.S.C. § 2000e-2(a)-(d). That proscription does not lead inevitably to the conclusion that a finding of discrimination against one individual or class of individuals empowers a court to order that a benefit be given to another individual or class of individuals. This Court has indeed twice prescribed, as the appropriate cure for a Title VII violation, that the individual victims of discrimination be put in their "rightful place." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 737 (1976); *Teamsters* v. *United States*, 431 U.S. 342, 362-376 (1977). And all of the opinions in *Franks* suggested that

chosen that course, and had its defense proved unsuccessful, a court could have imposed the kind of affirmative action program here at issue as a remedy for discrimination, as the court of appeals acknowledged (App. A., *infra*, p. 10a). Even without a finding or admission of discrimination, the same program could have been incorporated into a consent decree in settlement of the litigation, as the court of appeals also acknowledged (*id.* at 16a). Instead, however, the program was instituted voluntarily without the necessity of litigation, contested or uncontested."

U.S. Pet. at 12-13.

where injunctive remedies will subordinate the job rights of competing innocent employees, it is particularly important that such remedies be tailored to righting the wrong that was done *and no more*. This Court has never held that Title VII grants courts authority to award preferential treatment to non-victims. Yet the theories the Government seeks to pursue—but not the issue actually presented by this case—require that such a holding be made.

Moreover, Title VII contains an express prohibition against Government *imposition* of racial preferences to overcome underrepresentation of minorities. Section 703(j) of the Act, 42 U.S.C. § 2000e-2(j). Once a court-ordered "remedy" goes beyond making the victims of a violation whole to giving job preferences to non-victims, it is arguably no longer a remedy but a preference the sole purpose of which is to redress a numerical imbalance. And, the Government concedes in its petition "that . . . Executive Order [11246] cannot override Title VII." U.S. Pet. at 16. Any Government claim, therefore, that the OFCC has the power, pursuant to the Executive Order, to direct employers to grant preferential treatment based upon race to non-victims of discrimination must be measured against the expression in § 703(j) of Congressional hostility to Government imposition of such preferential treatment.

We do not mean to suggest that these considerations are *necessarily* fatal to the Government's theories, but we have noted them to show that the Government's theories implicate a number of difficult subsidiary questions which are not implicated by the question presented on the present record. The issue actually raised by the record in this case requires only discerning Congress' intention with respect to the permissible scope of *voluntary* private affirmative action.

Nor do we mean to suggest that the Government's theories are unimportant; indeed, in an appropriate case, they may well merit this Court's attention. But this case presents an issue which both is analytically distinct from,

and relates to different practical situations than, the Government's issues—one which is ready for decision now, and which merits this Court's immediate attention.

III.

It is of great practical importance that this Court address the question actually decided by the courts below—the question which we have raised in our petition—and not leave that question unresolved as the Government requests. The decision below poses immediate practical problems for USWA and the large segments of American industry with which it deals—as well as for other unions and employers—which have voluntarily established affirmative action programs for reasons other, and upon bases other, than the nice justifications the Government now sets out in its petition. The legality of those programs depends on the answer to the question which USWA has asked this Court to decide: whether, irrespective of the existence of prior discrimination at the plant, Title VII forbids private parties from voluntarily establishing programs like the one here to redress the effects of historic societal discrimination upon their workforce. Without an answer to that question, USWA, the employers with whom it deals, and other employers and unions will not have the guidance they need as to the legality of present affirmative action programs, much less as to whether they may lawfully establish new programs along the same lines.

The remand the Government requests would not only be pointless, as discussed in part I *supra,* the delay it would occasion would have serious harmful consequences to the national interest, as described in our petition at 10-11.[7]

[7] That American industry shares our view as to the need for immediate resolution is evident from the Brief Amicus Curiae of the Equal Employment Advisory Council In Support Of Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit.

CONCLUSION

The issue which is presented by this case is ready to be decided now. For the reasons stated in USWA's petition, this Court should grant certiorari to decide that issue, and should not summarily remand as the Government requests.

Respectfully submitted,

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